Supreme Court, U.S.
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IN THE
Supreme Court of the United States

E. CHUMA WADIBIA,

Petitioner,

v.

AUBURN UNIVERSITY, R. LEE EVANS,
in his individual and official capacities,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether under Title VII the petitioner presented evidence of pretext sufficient to defeat the respondents' motion for summary judgment, without the need to show that such evidence, by itself, was probative of discrimination.

II. Whether the respondents' use of a subjective standard for employment performance was sufficient evidence to defeat the petitioner's prima facie case of discrimination.

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Eleventh Circuit Court of Appeals in this case.

OPINIONS BELOW

The Eleventh Circuit opinion and order affirming the district court is unpublished and is contained in Appendix A. The district court opinion is similarly unpublished and contained in Appendix B.

STATEMENT OF JURISDICTION

The Eleventh Circuit Court of Appeals entered judgment on January 25, 2000. App. A. The Court of Appeal entered an order denying a timely petition for rehearing and petition for rehearing en banc on April 25, 2000. App. C.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* Title VII states in pertinent part:

> It shall be an unlawful employment practice for any employer —
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation,

terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

On July 10, 1998, petitioner Dr. E. Chuma Wadibia sued respondents Auburn University and R. Lee Evans, in his individual and official capacities, in the United States District Court for the Southern District of Alabama. Wadibia asserted claims of racial discrimination under Title VII and 42 U.S.C.A. § 1981.

Auburn University employed Wadibia as a full-time tenure track Assistant Professor in the school of pharmacy from July 1, 1996 through February 10, 1999. He is a black male. Wadibia's supervisor was Dr. Robert S. Smith, head of the Department of Clinical Pharmacy. Until October 1997, Wadibia was an average employee and received a corresponding evaluation in August of 1997 from Smith.

On October 16, 1997, Wadibia and a co-employee Eileen Holland were involved in a personal and professional altercation where after each accused the other of unprofessional behavior. Holland alleged that Wadibia threatened and intimidated her. Wadibia alleged that Holland called him "nigger boy." The next day, Smith and respondent Evans placed Wadibia on administrative leave with pay for one month pending an investigation into the incident and reassigned his students. Holland, a white female, was not placed on similar leave and retained all of the responsibilities and privileges of her position.

In response to Auburn's actions, on October 22, 1997, Wadibia filed a complaint of discrimination with the Equal Employment Opportunity Commission ("EEOC") and internally with Auburn University. After learning of his complaint in October, the respondents created a hostile work environment and engaged in a pattern of discrimination that culminated in Wadibia's unlawful termination on February 10, 1999: he experienced diminished student ratios and lack of opportunities to teach the following semester; he received a substandard evaluation based on subjective criteria on June 2, 1998, shortly after Auburn learned that the EEOC issued a right to sue letter on April 17, 1998; after filing his federal lawsuit on June 10, 1998, he received a letter on July 31, 1998 ending his contract effective January 31, 1999; between July 31, 1998 and January 1999 he received conflicting oral and written communications from his supervisor Smith regarding his ability to retain his position; and, the respondents fired him without further written evaluation as promised by his supervisor Smith.

Wadibia's federal action alleged that these actions formed four Title VII violations: the respondents: (i) treated Wadibia dissimilarly from a similarly situated white employee; (ii) terminated Wadibia from his position; (iii) retaliated against Wadibia for engaging in statutorily protected expression; and (iv) subjected Wadibia to a hostile work environment.

The respondents filed summary judgment against Wadibia. In his opposition, Wadibia presented evidence to support a prima facie case on each claim. Wadibia further presented evidence that the respondents' proffered reasons for their acts were false or were based on subjective standards of employment performance. Nonetheless, the district court

entered summary judgment against him on all claims on August 26, 1999 relying on the subjective evidence and concluding, among other issues, that Wadibia failed to show that the evidence of pretext was probative of intentional discrimination. App. B at 25a, 26a, 28a.

Wadibia filed a timely appeal on September 23, 1999. On January 25, 2000, the Eleventh Circuit Court of Appeals affirmed the district court's judgment. App. A at 2a. The court of appeals denied the timely filed petition for rehearing and rehearing en banc on April 25, 2000. App. C at 34a.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS OF THE SUPREME COURT AND WITH PRIOR DECISIONS OF THE ELEVENTH CIRCUIT.

The court of appeals' affirmation of the district court's entry of summary judgment cannot be squared with Supreme Court precedent.

St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993) confirmed the allocation of the burden of production and an order for the presentation of proof in discriminatory treatment cases set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and its progeny. First, the plaintiff must establish a prima facie case of discrimination, *St. Mary's* at 506, then the burden is shifted to the defendant to produce evidence that the adverse employment action was taken for a legitimate, nondiscriminatory reason. Once these

evidentiary requirements are met, the *McDonnell Douglas* framework — with its presumptions and burden — disappears and the remaining issue is "discrimination vel non." *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 714 (1983).

The *St. Mary's* decision clarified that

> although the presumption of discrimination "drops out of the picture" once the defendant meets its burden of production, [*St. Mary's* at 511], the trier of fact may still consider the evidence establishing the plaintiff's prima facie case "and inferences properly drawn therefrom . . . on the issue of whether the defendant's explanation is pretextual," [*Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255 (1981)].

Reeves v. Sanderson Plumbing Products, Inc., 120 S. Ct. 2097, 2106 (2000).

However, this Court further reasoned, it is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination.

St. Mary's at 511.

Such an inference is "consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt.' *Wright v. West*, 505 U.S. 277, 296 (1992) [further citations omitted]." *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097, 2108 (2000). Thus, a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.

The decision below cannot be reconciled with *St. Mary's*. The district court found that the petitioner's evidence showing the falsity of respondents' proffered reasons for the adverse employment actions were not, by themselves, demonstrative of a discriminatory intent. App. B 25a, 26a, and 28a. Under *St. Mary's*, however, the petitioner is entitled to have a trier of fact determine whether the falsity of the proffered reason, alone, is sufficient evidence to conclude that the respondent unlawfully discriminated.

The decision below also conflicts with previous opinions of the Eleventh Circuit. In *Carter v. Three Springs Residential Treatment*, 132 F.3d 635 (11th Cir. 1998), the court of appeals determined that to overcome the plaintiff's prima facie case, a defendant must show the existence of an objective test of employment performance binding on all who are similarly situated. Subjective standards of employment performance are incapable of reasonable objective evaluation and cannot be relied upon by an employer seeking to defeat the plaintiff's prima facie case. *Id.* at 644.

In this case, one of Wadibia's claims was that race discrimination motivated his termination. There is no dispute that Wadibia is black and was terminated from his position. His supervisor, Smith, admitted that Wadibia had the qualifications necessary for the job and testified that Wadibia's position remained open. Thus, the petitioner met his burden to overcome summary judgment by producing evidence to establish a prima facie case.

The respondents argued that they fired Wadibia because of his work performance. However, under the opinion articulated by the court of appeals in the *Three Springs* case, this issue under these facts is not appropriate for summary judgment because the evaluation of Wadibia's work performance was based on subjective criteria.

Smith, Wadibia's supervisor, testified that they terminated Wadibia essentially because of poor teaching, scholarship and attitude. Wadibia presented evidence that his teaching evaluations were not the lowest; other white employees had lower evaluations; and Smith testified that Wadibia's scholarship was in fact average. Thus, Wadibia's attitude is the only remaining factor behind the respondents' decision to terminate. Attitude is a question of intent and motivation and is simply not an appropriate issue on which to base summary judgment under the standard articulated by the Eleventh Circuit in the *Three Springs* case. *See also Pearson v. Macon-Bibb County Hospital Authority*, 952 F.2d 1274, 1280 (11th Cir. 1992), citing *Delgado v. Lockheed-Georgia Company*, 815 F.2d 641, 644 (11th Cir. 1987).

The court of appeals noted in *Three Springs*: "While there is nothing inherently wrong with allowing decision makers to base decisions on subjective criteria, we have

found that 'subjective evaluations involving white supervisors provide a ready mechanism for racial discrimination.' [*Miles v. M.N.C. Corp.*, 750 F.2d 867, 871 (11th Cir. 1985)]." Like the plaintiff in the *Three Springs* case, Wadibia presented at least a jury question in that his employer used subjective evaluations that cannot be relied upon by the employer seeking to defeat plaintiff's prima facie case. *Id.*

II.

THE QUESTIONS PRESENTED ARE IMPORTANT.

The court of appeals issued its affirmation of summary judgment without explanatory opinion. The issues raised by the affirmation, however, highlight the spotty application of clear Supreme Court precedent in Title VII discrimination cases. Despite that this Court has issued a clear mandate against discriminatory practices and has clarified the procedure by which a plaintiff may take his case to the jury, those substantive and procedural safeguards are undermined where, as here, the law of this Court is ignored.

In this case, the petitioner presented sufficient evidence of a prima facie case on all four of his claims. The respondents' articulated reasons for the adverse employment actions were the same for each claim: the petitioner performed poorly. The petitioner effectively presented sufficient evidence that would allow a trier in fact to disbelieve the respondent and find the proffered reasons false. The district court's requirement that the petitioner show further that the evidence is probative of discriminatory intent is in direct contradiction to this Court's decision in *St. Mary's*. It is disturbing that the clear mandates of this

Court regarding the procedural requirements for surviving summary judgment on a Title VII case are being disregarded.

Moreover, the court of appeal's disregard for it own prior precedent regarding the use of subjective criteria in employment decisions is equally disturbing. The petitioner produced evidence that the respondents' proffered reasons for the discrimination were false, all except attitude. The Eleventh Circuit held in *Three Springs* that subjective rationales like attitude are questions of intent and motivation and not an appropriate issue on which to base summary judgment. The Eleventh Circuit's inconsistent application of the law to the facts is a compelling reason to grant certiorari in this case.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED, ENTERED AND FILED JANUARY 25, 2000

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 99-13649CC
Non-Argument Calendar

District Court No. 98-00722-CV-BH-M

E. CHUMA WADIBIA,

Plaintiff-Appellant,

versus

AUBURN UNIVERSITY, R. LEE EVANS,
in his individual and official capacities,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Alabama

Before BIRCH, DUBINA and CARNES, Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Southern District of Alabama, and was taken under submission by the

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Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

It is FURTHER ORDERED THAT plaintiff-appellant pay to the defendants-appellees, the costs on appeal to be taxed by the Clerk of Court.

Entered: January 25, 2000
For the Court: Thomas K. Kahn, Clerk

By: s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: MAY 05, 2000

APPENDIX B — FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION DATED AND FILED AUGUST 26, 1999

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION NO.
98-0722-BH-M

E. CHUMA WADIBIA,

Plaintiff,

v.

AUBURN UNIVERSITY, et al.,

Defendants.

FINDINGS OF FACT; CONCLUSIONS OF LAW AND ORDER

This action is before the Court on defendants' motion for summary judgment (Doc. 20). In his complaint, as amended, the plaintiff alleges that he was discriminated against on the basis of his race and national origin by subjecting him to a racially hostile environment and that he was retaliated against for complaints of alleged discrimination and harassment. Upon consideration of the motion, plaintiff's response in opposition thereto (Docs. 28

and 29) and all other pertinent portions of the record, the Court concludes that the defendants' motion is due to be granted.

FINDINGS OF FACT

The Court, based upon the pleadings and both documentary and testimonial evidence submitted by the parties, specifically finds that the following material facts are undisputed or uncontroverted:

1. The plaintiff, Dr. Chuma Wadibia (Wadibia), was employed at Auburn University's School of Pharmacy from July 1, 1996, through February 10, 1999, as a full-time Assistant Professor. He is a black male who is a native of Nigeria. Wadibia did not have a contract with the individual defendant, Dean R. Lee Evans.

2. Wadibia's complaint in this action was filed on July 10, 1998, and amended to include a retaliatory termination claim on May 28, 1999 (Doc. 26). In addition to his statutory Title VII claims of a racially hostile work environment and retaliation, Wadibia alleges that his Fifth and Fourteenth Amendment rights were violated when he was placed on administrative leave with pay. Finally, Wadibia asserts state law claims of breach of contract and intentional infliction of emotional distress.

3. Wadibia's specific assignment was the Department of Clinical Pharmacy Practice ("the Department") with his practice site in Mobile, Alabama. Auburn and the University of South Alabama College of Medicine (USA) located in

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Mobile, have a cooperative arrangement whereby Auburn Pharmacy students, as part of their curriculum, gain clinical experience working in facilities operated by USA. This program is referred to as the professional experiential program.

4. Wadibia does not dispute that the aforementioned professional experiential program is designed to provide students the opportunity to apply their didactic knowledge in supervised patient care settings. It is further undisputed that students may elect to participate in various five week rotations such as family practice or cardiology. Successful completion of these rotations is required for graduation. As part of this program, students "present" information regarding patients to faculty. Both formal and informal presentations are generally required. Informal presentations are made to the student's particular preceptor (faculty advisor) while formal presentations are made to a group of preceptors.

5. Wadibia was expected to supervise some of the Auburn students who were enrolled in the experiential program. He was also expected to work with physicians and others from the Division of Cardiology at USA as a consultant on clinical pharmacology and collaborative research matters. Other Auburn faculty members in the Department, including Dr. Eileen Holland (Holland) and Dr. Mike Chicella, had similar assignments at USA.

6. The Auburn faculty assigned to USA in Mobile were supervised by Dr. Robert S. Smith (Smith), Head of the Department. Dr. Smith's office was located at Auburn University in Auburn, Alabama.

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7. Prior to his actual employment, Wadibia was advised by Dr. Smith in a letter dated May 29, 1996:

> Your specific practice responsibilities will be to develop a Pharmaceutical care practice within the Department of Cardiology at the University of South Alabama College of Medicine. This practice should enable you to precept two students for approximately 35 weeks each year. Faculty may request additional students if they desire. Your scholarship interests should be developed in compliance with the research interests of the Department of Cardiology. In addition, all of your pharmaceutical care practice should be compatible with the directions and desires of the Department of Pharmacy at USA Hospital. Each pharmacy practice faculty member is responsible for a mutually-determined amount of classroom teaching in the department's team-taught therapeutics course. This usually amounts to approximately 20-25 classroom hours each year.

Smith Decl. at Exhibit 1.

8. Mike Blakely (Blakely) was an employee of USA who served as the Pharmacy Director of USA's hospital, otherwise known as the University of South Alabama Medical Center or USAMC. Eric Dawson (Dawson) was an employee of USA who also held an adjunct appointment with Auburn University. One of Dawson's responsibilities was to evaluate daily the appropriateness of all prescribed restricted antibiotics.

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9. Wadibia does not dispute that the Auburn faculty seemed concerned about his competence almost from the time of his arrival. He testified in his deposition that Mike Blakely "was sending Eileen Holland and Eric Dawson to be following me around and be asking me questions . . . trying to find out what I knew and what I didn't know . . . trying to evaluate my skills, my competence, my ability to do my job." Wadibia Depo. at p. 64/10-18.

10. Although Wadibia argues that he "was fully qualified to perform his tasks" (Wadibia Brief in Opposition at 1), he does not dispute that both students and faculty expressed concern within months of his arrival about his performance and competence. The evaluations and student comments concerning Wadibia's first lecture in a pharmacology course offered to USA medical students were poor.

11. In April, 1997, Wadibia complained to Paula Berger, EEO Compliance Officer for USA, that Mike Blakely was harassing him because of his race. In his written complaint, Wadibia alleged that Blakely made derogatory comments. On deposition, however, Wadibia testified that the derogatory comments were being addressed as "you, hey, you." Wadibia Depo. at pp. 66/22-23 and 67/1-2. According to Wadibia's deposition testimony, Blakely simply made him uncomfortable by monitoring him too closely, not addressing him "professionally," questioning his credentials and telling him that his work was full of flaws. *Id.* at pp. 64/11-21 and 67/1-5.

12. It is undisputed that USA investigated Wadibia's allegations against Blakely and found no evidence to suggest

that Wadibia was being harassed or discriminated against on the basis of his race. Auburn's only involvement with respect to this complaint, or its resolution, was to provide requested information to USA. Wadibia never complained about Blakely again and admits that he did not encounter further problems with Blakely. Wadibia Depo. at p. 69/2-11.

13. Wadibia also does not dispute that, in the summer of 1997, he failed to make necessary arrangements prior to the arrival of students assigned to his rotation. As a result the students reported to USA without appropriate orientation and instruction. Although Wadibia complains that "Dr. Holland constantly interfered with [his] professional judgment with respect to his students" (Wadibia Brief in Opposition at 2), he does not dispute that on this occasion Holland took care of his students and reminded him that she would cover for him if he was unable to meet his students and that he should let her know if and when such arrangement was necessary. Wadibia agreed that he would do so.

14. Wadibia has presented no evidence to contradict Holland's testimony concerning the complaints of students about Wadibia throughout the summer of 1997 and the fact that she shared this information with Smith, the Department Head.

15. Two black students participated in the cardiology rotation during the course of Wadibia's employment. The first was G.B., whose rotation occurred in May of 1997. The second was L.A. whose rotation occurred in October of 1997.

16. Although Wadibia complains that "Dr. Holland harshly criticized one of [his] students and made a racially

derogatory remark about the student" (Wadibia Brief in Opposition at 2), he does not identify the student about whom such alleged criticism or remark was leveled. In his deposition, Wadibia states only that Holland "kept asking me the grading I was going to give [G.B.]." Wadibia Depo. at p. 57/11-15. With respect to L.A., Wadibia testified only that Holland "made comments like, you know, she was dumb, she was way behind where she should have been on her rotation." *Id.* at p. 59/2-4.

17. G.B. made a formal presentation to the faculty on or about May 1, 1997. According to Holland, the student's presentation was poor, and included numerous mistakes which were not corrected by Wadibia. Holland was very concerned that the recommendations made by G.B. during the presentation, if made and followed by clinicians, would cause significant patient harm and possible death. Holland declared that it was these concerns and not race that prompted her to question Wadibia's evaluation of G.B.'s performance. (Holland Decl. at ¶ 12).

18. In September, 1997, Dr. Smith instructed the Auburn faculty working at USA to hold weekly meetings to enhance communication and efficiency within the group. USA employees who were involved with Auburn's program, like Blakely and Dawson, were invited to participate in the weekly meetings. These meetings also served as an opportunity for student presentations. Holland, who was the most senior faculty member, was to coordinate the weekly meetings. Wadibia does not dispute that he frequently failed to attend these meetings, arrived late and/or left early.

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19. L.A. was the first student to participate in a clinical rotation after the institution of the weekly meetings and was the only student completing a rotation at USA at that particular time. L.A. was a marginal student who failed to pass a prior rotation at another facility. Wadibia Depo. at p. 139/2-16. As stated above, Wadibia served as L.A.'s preceptor.

20. It is undisputed that L.A. made a formal presentation to the faculty several weeks into her rotation which was among the poorest the faculty had ever seen. Following this presentation, the faculty discussed L.A.'s performance and the necessity that it improve if she expected to successfully complete the rotation. Although Wadibia complains about Holland's interference, he neither disputes that she volunteered to work with L.A. to improve her performance or that on October 14, 1997, L.A. herself sought Holland's assistance with regard to L.A.'s preparation for her next formal presentation to the faculty.[1]

21. Wadibia does not dispute that he and other faculty believed that L.A.'s performance improved drastically

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1. L.A. sought Dr. Holland's assistance the day following an informal presentation given by L.A. which led Dr. Holland to again question Dr. Wadibia's efforts to teach L.A. During Holland's conversation with Wadibia after L.A.'s informal presentation, Holland suggested that Wadibia provide L.A. with a mid-point evaluation identifying areas in which L.A. needed improvement. During this same conversation, Wadibia admitted that he was not going on rounds with L.A. and that she was being allowed in patient care situations without supervision despite the faculty's prior decision that she not be allowed to engage in such activities independently.

subsequent to Holland's intervention. It is also undisputed that L.A. publicly thanked Holland for her assistance and sent her a thank you card "for being caring and understanding." (Holland Decl. at ¶ 8). Holland reported to Auburn that L.A.'s strengths were an analytical mind and her diligence. (*Id.* at ¶ 8 and Exhibit 1).

22. On October 15, 1997, the faculty's weekly meeting was scheduled to begin at 12:00 p.m. but Wadibia arrived approximately 30 minutes late and only after being paged by Holland. Faculty members first discussed their activities since the last meeting. Wadibia was asked not only about significant drug interaction involving cardiovascular drugs but what, if any, efforts he had made to assist L.A.

23. L.A. then joined the October 15, 1997 meeting to make her formal presentation. During the question and answer portion of the presentation, Wadibia stood up to leave and told Holland that he needed to speak with her outside. Although their descriptions differ in some respects, each admits that a confrontation between the two occurred.

24. According to Wadibia, he "confronted Holland about her constant interference into his professional judgment with his students; her constant hostile and demeaning attitude towards him in the presence of his students and her constant challenges of his instructions and authority given to his students [and] [d]uring the course of an explosive conversation between [himself] and Holland, used a racial epithet . . . by referring to him as a 'nigger boy'." Wadibia Brief in Opposition at 2. Dr.

25. Holland agreed that Wadibia confronted her and told her that she was not his supervisor, that she had no right to question him about his activities or his students and that, if she had a problem with him, she should talk to Dr. Smith, the Department Head. According to Holland, she then told Wadibia that she was concerned about Auburn's students and had already communicated to Dr. Smith her opinion that Wadibia was incompetent and not providing a good educational experience for the students. Holland contends that she then told Wadibia that she needed to return to the presentation and that the hallway was not the place to have a discussion. According to Holland, it was then that Wadibia told her that he was not finished with her; moved towards her shaking his finger in her face; acted in a threatening and violent manner coming very close to physical contact; called her an "idiot fool"; knocked a bulletin board off the wall; and "was generally out of control. *See*, Holland Decl. at ¶ 9; Wadibia Depo. at pp. 87-96.

26. Immediately after the confrontation with Wadibia, Holland returned to L.A.'s presentation. When the faculty told L.A. that her performance was improved, L.A. gave the credit to Holland. (Holland Decl. at ¶ 9; Smith Decl. at ¶ 11). Shortly after L.A. completed her presentation, Holland reported to Dr. Smith and others that she was in fear for her safety. (Holland Decl. at ¶¶ 9 and 10). Dr. Smith believed Holland was genuine and sincere in her concern. (Smith Decl. at ¶ 8).

27. The following day, Dr. Smith spoke with Wadibia, who confirmed that the confrontation with Holland had occurred. Wadibia reported that, during the confrontation,

Holland had referred to him as "nigger boy." When thereafter confronted with Wadibia's accusation, Holland adamantly denied making the alleged comment. (Smith Decl. at ¶ 9; Holland Decl. at ¶ 9). The Court need not make an impermissible credibility determination, however, inasmuch as Wadibia testified at his deposition that this comment allegedly made by Holland was the only racial slur he ever heard in the workplace. Wadibia Depo. at p. 48/4-14.

28. Wadibia has also maintained that Holland was not his supervisor but merely his "co-worker." Wadibia Depo. at p. 50/7-9. It was, in fact, Holland's alleged intrusion and interference with Wadibia's activities when she had no authority to supervise him which forms the basis for the hostile environment claim herein asserted by Wadibia.

29. Wadibia does not dispute either that Dr. Smith consulted with the Dean of the School of Pharmacy, Dr. Lee Evans, regarding the appropriate action to take under the circumstances or that together Dr. Smith and Dr. Evans decided to temporarily remove Wadibia from the workplace "to facilitate a timely investigation of alleged complaints." (Smith Decl. at ¶ 10 and Wadibia Depo. at Exhibit 20). On October 17, 1997, Wadibia was advised by Smith and Evans over the telephone that he was being placed on "Administrative Leave With Pay" and a letter to this effect was sent to Wadibia that same day. (*Id.*) The student Wadibia was supervising at this time, previously identified as L.A., was reassigned for the remainder of that rotation.

30. On October 18, 1997, Wadibia filed a complaint with Auburn's AA/EEO Office. He alleged that, in

connection with the Holland incident and the resulting leave, he was being subjected to racial harassment and workplace discrimination. Subsequent to its investigation, the Auburn AA/EEO Office advised Wadibia that

> it could find no evidence to support [his] allegation that [Holland's] treatment of [Dr. Wadibia] was in any way negatively influenced by [his] race . . . [and] that Dr. Holland has not violated the University's policy prohibiting discrimination on the basis of race. With regard to the complaint against the School of Pharmacy, I could find no evidence that your temporary administrative leave was related to your race.

(Wadibia Depo. at Exhibit 22). The EEOC came to the same conclusion concerning the complaint Wadibia filed with the EEOC on October 22, 1997. (*Id.* at Exhibit 36).

31. Although Wadibia complains that "members of management . . . failed to correct the hostile environment by disciplining Dr. Holland for her behavior" (Wadibia Brief in Opposition at 3), he does not contend that Dr. Smith either failed in a timely fashion to adequately investigate the matter or did not counsel Holland as he claimed regarding the inappropriateness of racial slurs. Wadibia also admits that, following his return to work on or about November 17, 1997, he had no further problems with Holland. Wadibia Depo. at p. 124/19-23 and p. 125/1-9.

32. Wadibia does not dispute that no public statements were made regarding his being placed on leave or about the

circumstances which prompted the leave. Even the members of the Department of Clinical Pharmacy were not advised and only those who were witnesses were involved in any way. Except for the essential involvement of the USA witnesses and USA's AA/EEO Officer, the entire matter was handled within the confines of Auburn's Pharmacy School administration.

33. Although he argues that his "supervisor stopped assigning students to [him]" and that subsequent to his EEOC complaints his "student teacher ratio had dropped drastically" (Wadibia Brief in Opposition at p. 3), Wadibia has presented no evidence that any specific student's request to be assigned to him was ever denied. According to his deposition testimony, student assignments are made at Auburn's main campus by an individual identified only as Diane Beck[2] and any student's request for assignment to a particular precept will be granted if possible. Wadibia Depo. at pp. 125/21-23; 127/17-23; and 128/1-5. Wadibia has proffered no evidence that Auburn took any action to discourage or prevent any student from participating in Wadibia's rotation. Nor has he contradicted or disputed the evidence that he received poor evaluations from students regarding his clinical rotation and teaching. *See e.g.*, Smith Decl. at ¶ 25 and Exhibit 5.

34. Wadibia also argues that his "supervisor further verbally advised him that he wouldn't get tenure" but admits that this same "supervisor wrote Plaintiff and denied making the statement." Wadibia Brief in Opposition at p. 3. However,

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2. Dr. Wadibia has presented no evidence that Diane Beck possessed or exercised any supervisory authority over his activities.

it is undisputed that Wadibia read and understood Auburn's policy regarding tenure and knew that he would not even be eligible for tenure consideration until 2002. Wadibia Depo. at pp. 165/10-12; 164/22-23 and 165/1. Wadibia admits that he was never told that he would be denied the various steps in the tenure consideration process. *Id.* at p. 167/20-22.

35. Wadibia's 1996-1997 performance evaluation ranked his performance as "average" and indicated that "a senior faculty member should be assigned to mentor Dr. Wadibia during the next 2-3 years of his development." Wadibia Depo. at Exhibit 37. It is undisputed that, in addition to this formal evaluation signed by Wadibia on September 3, 1997, Dr. Smith had spoken on numerous occasions with Wadibia regarding performance related issues and ultimately concluded that Wadibia refused to accept any constructive criticism regardless of the source. (Smith Decl. at ¶ 26). Despite Wadibia's general allegations, there is no evidence that his performance evaluation following his October 1997 complaints was less than it would have been absent the complaints.

36. Wadibia does not deny that, in early January of 1998 during a conversation with Dr. Smith, he warned Smith "not to try anything" and that, as a result, Smith advised him in writing that such a "warning" was totally inappropriate and unprofessional. (Smith Decl. at ¶ 16 and Exhibit 3).

37. On or about June 1, 1998, Smith met with Wadibia to evaluate Wadibia's performance for the prior academic year. Wadibia refused to accept Smith's assessment of his performance. Wadibia does not dispute that, instead, he made

numerous threatening statements, including a threat of negative publicity for the University as well as Smith personally, if Smith evaluated his performance at a level lower than Wadibia believed he deserved. *See*, Wadibia Depo. at Exhibit 26. Upon his return to Auburn after this meeting with Wadibia, Smith advised Wadibia in writing that his behavior and comments constituted insubordination and

> any further threats to [Smith], other faculty members, staff and/or employee of USA will not be tolerated. In addition, insubordination will result in appropriate personnel action within the University. I am willing to work through this situation, but only if you develop an ability to accept and respond positively to constructive criticism.

(*Id.*)

38. Dr. Smith and Dean Evans continued their discussions about whether Wadibia's employment should be terminated. On July 9, 1998, Dr. Smith sent a follow-up letter to Wadibia and explained that Wadibia's attitude toward him in the June meeting had made it impossible to discuss various performance issues. Consequently, Smith set forth in this letter the areas in which Wadibia would be required to improve his performance. Wadibia was advised that, in addition to improving his teaching and research skills and his relationships with faculty and colleagues, he must accept constructive criticism. Wadibia was also reminded that, under Auburn University policy, a third year or mid-tenure review

would be conducted prior to his thirty-second month of employment. Dr. Smith offered to help Wadibia prepare his review material. (Wadibia Depo. at Exhibit 27).

39. Later in July, after months of deliberation, Dean Evans and Dr. Smith came to the conclusion that Wadibia's performance and willingness to cooperate were so deficient that, without prompt and drastic improvement, his employment would have to be terminated. On July 31, 1998, timely written notice[3] was given to Wadibia that his contract with Auburn would not be continued after January 31, 1999. Wadibia was also told, however, that his noncontinuation might be reconsidered if he were to make satisfactory improvements in specific areas. He was instructed to submit documentation of his interactions and activities with Auburn faculty as well as the Pharmacy Director and to provide Dr. Smith with a monthly written report of his efforts to improve in the deficient areas. (Wadibia Depo. at Exhibit 28). It is undisputed that Wadibia failed to modify his performance and failed to submit the documentation required under the July 31, 1998 letter. Dr. Smith attempted on several occasions to meet and/or speak with Wadibia to discuss Wadibia's performance. Wadibia refused to meet or speak with Dr. Smith. (Smith Decl. at ¶ 18).

40. On September 14, 1998, Dr. Smith again wrote Wadibia expressing his concern about Wadibia's refusal to discuss performance issues. *See*, Wadibia Depo. at Exhibit

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3. Dr. Wadibia had a 12-month appointment but less than three years of service so the notice period applicable to him under Auburn's Faculty Handbook was "[s]ix months prior to noncontinuation date." (Smith Decl. at ¶ 23 and Exhibit 4 at 3:25).

Appendix B

29. In October of 1998, Smith requested that Wadibia meet with him to discuss his goals for the 1998-99 academic year and to discuss preparation of the material for the third-year review due February or March of 1999 in the event his non-continuation was reconsidered. *See*, Wadibia Depo. at Exhibit 30 and Smith Decl. at ¶ 19. Wadibia refused to meet with Smith until November 1998. Smith expressed regret that Wadibia had failed to meet with him sooner to address the deficiencies outlined in the July 1998 letter. (Wadibia Depo. at Exhibits 31 and 32).

41. In late January 1999, Dean Evans with the input of Dr. Smith reviewed Wadibia's performance since the July 1998 notice of non-continuation was issued. In their opinion, Wadibia had failed to improve his performance sufficiently in the specified areas and had failed to provide the required documentation. As a result, the University terminated Wadibia's employment effective February 10, 1999. (Smith Decl. at ¶ 22).

42. Wadibia has failed to present evidence that the reasons given for his termination, namely his sub-standard job performance and unwillingness to cooperate, were pretextual. The Court therefore agrees that, even if Wadibia's complaints in October of 1997 somehow affected the termination decision, a proposition in support of which no evidence has been offered beyond some mere coincidence of time, the same employment decision would have been made for legitimate reasons unrelated to race or these complaints.

Appendix B

CONCLUSIONS OF LAW

Summary judgment not only is proper, but "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law . . ." F.R.Civ.P. 56(c). The movant bears the initial burden of showing the court that no genuine issues of material fact exist to be decided at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986); *Clark v. Coates & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991). The moving party discharges this burden by "showing" or "pointing out" the absence of evidence to support the non-moving party's case. *Jeffery v. Sarasota White Sox, Inc.*, 64 F.3d 590, 593 (11th Cir. 1995), *quoting*, *Celotex*, 477 U.S. at 325, 106 S.Ct. at 2553-54. When the moving party has discharged its burden, the non-movant must go beyond the pleadings and designate specific facts showing there is a genuine issue for trial. *Jeffery*, 64 F.3d at 593; *Celotex*, 477 U.S. at 324, 106 S.Ct. at 2553.

In deciding whether the moving party has met its burden, the court is obligated to draw all inferences from the evidence presented in the light most favorable to the non-movant and to resolve all reasonable doubts in that party's favor. *Spence v. Zimmerman*, 873 F.2d 256, 257 (11th Cir. 1989). However, inferences in favor of the non-movant are not unqualified. "Mere general allegations which do not reveal detailed and precise facts will not prevent the award of summary judgment." *Resolution Trust Corp. v. Dunmar Corp.*, 43 F.3d

587, 592 (11th Cir. 1995) (citation omitted). Moreover, evidence that is merely colorable (*see, Brown v. City of Clewiston*, 848 F.2d 1534, 1537 (11th Cir. 1988), conclusory (*see, Peppers v. Coates*, 887 F.2d 1493, 1498 (11th Cir. 1989), or conjectural does not create a genuine issue of material facts.

If a reasonable fact finder evaluating the evidence could draw more than one inference from the facts, and if that inference introduces a genuine issue of material fact, the court should not grant summary judgment. *August Iron & Steel Works v. Employers Ins. of Wausau*, 835 F.2d 855, 856 (11th Cir. 1988). However, a "genuine" dispute about a material fact only exists if the "evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Jeffery*, 64 F.3d at 594, *quoting, Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). The bottom line is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-52, 106 S.Ct. at 2512.

As applied to this action, it is first evident that, to the extent Wadibia asserts a Title VII claim against Dean Evans, it is due to be dismissed. The law in this Circuit is well settled that there is no individual liability under Title VII. *Edwards v. Wallace Community College*, 49 F.3d 1517, 1520 n. 3 (11th Cir. 1995); *Cross v. Alabama*, 49 F.3d 1490, 1504 (11th Cir. 1995); *Busby v. City of Orlando*, 931 F.2d 764, 772 (11th Cir. 1994); *Hamm v. Lakeview Community Hosp.*, 950 F.Supp. 330, 333 (M.D. Ala. 1996). Wadibia cites no legal

support, and none exists, for his contention that Evans' mere "authority to hire and fire" renders him an "employer" within the meaning of Title VII either in his individual or official capacity.

Wadibia's opposition to summary judgment on his punitive damage claim under either Title VII or § 1981 against Auburn University is similarly specious. The governing statute specifically provides that punitive damages may not be recovered against a state agency such as Auburn University. 42 U.S.C. § 1981a(b)(1). Wadibia ultimately admits as much when he states "Auburn may be shielded from punitive damage award through Title VII and Section 1981 claims." Wadibia Brief in Opposition at 6. Wadibia then argues, however, that he is nonetheless entitled to pursue punitive damages "through his state law claim of intentional infliction of emotional distress." *Id.* Wadibia again fails to cite any legal support for this proposition and none exists.

To set forth a *prima facie* case of hostile work environment based upon race, Wadibia must establish that: (1) he belongs to a protected class; (2) he was subject to unwelcome racial harassment; (3) the harassment was based on race; (4) the harassment affected a term, condition or privilege of employment; and (5) respondeat superior. *Dudley v. Wal-Mart Stores, Inc.*, 931 F.Supp. 773, 790 (M.D. Ala. 1996), *citing*, *Henson v. City of Dundee*, 682 F.2d 897, 903-05 (11th Cir. 1982). Although dealt with in the context of a sexual harassment claim, the Supreme Court generally reviewed hostile environment liability in *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275, 2283-84, 141 L.Ed.2d 662 (1998) and concluded, *inter alia*:

> "Mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" would not sufficiently alter terms and conditions of employment to violate Title VII.[4]
>
> "[D]iscourtesy or rudeness should not be confused with racial harassment" and . . . "a lack of racial sensitivity does not, alone, amount to actionable harassment."[5]
>
> "[S]imple teasing," . . . offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the "terms and conditions of employment."[6]

The Supreme Court then emphasized:

> These standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a "general civility code." . . . Properly applied, they will filter out complaints

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4. 524 U.S. at __, 118 S.Ct. at 2283, *quoting*, *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957, 92 S.Ct. 2058, 32 L.Ed.2d 343 (1972).

5. 524 U.S. at __, 118 S.Ct. at 2283, *quoting*, 1 B. Lindemann & P. Grossman, Employment Discrimination Law 349, and nn. 36-37 (3d ed. 1996).

6. 524 U.S. at __, 118 S.Ct. at 2283, *quoting*, *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, __, 118 S.Ct. 998, 1003, 140 L.Ed.2d 201 (1998).

> attacking "the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender [or racial]-related jokes, and occasional teasing." . . . We have made it clear that conduct must be extreme to amount to a change in the terms and conditions of employment, and the Courts of Appeal have headed this view.

Faragher, 524 U.S. at __, 118 S.Ct. at 2283-84 (internal citations omitted). Consequently, there does exist the ultimate support, despite Wadibia's contention to the contrary, for *Bolden v. PRC, Inc.*, 43 F.3d 545, 551 (10th Cir. 1994) (To rise to the level of a racially hostile work environment, "there must be a steady barrage of opprobrious racial comments.") and *Dudley*, 931 F.Supp. at 791 (same).

As applied to this case, Wadibia contends that during his October 1997 "explosive conversation" with Holland, she referred to him as "nigger boy." Wadibia admits that this is the only racial slur he ever heard in the workplace. Holland adamantly denies ever saying such a thing. However, even if this solitary comment was made, it did not create as a matter of law a hostile work environment. The law could not be more precise. An isolated remark by a co-worker is not enough to be actionable. Wadibia's reliance on alleged comments by Holland regarding black students for which he was preceptor is equally unavailing. The comments on which Wadibia relies are also insufficient as a matter of law to constitute a racially hostile environment. Finally, Wadibia's complaints concerning inquiries about his work and students do not, alone or in conjunction with the

aforementioned alleged comments, constitute impermissible racial harassment. Conversations regarding performance issues do "not constitute harassment simple because they cause the employee distress. *Keever v. City of Middletown*, 145 F.3d 809, 813 (6th Cir.), *cert. denied*, __ U.S. __, 119 S.Ct. 4075, 142 L.Ed.2d 330 (1998). The Court agrees that Wadibia has failed to proffer any evidence that these work-related discussions or inquiries were improper or occurred because of his race or national origin. Wadibia's self-serving, speculative testimony that he was subjected to this "interference" because of his race or national origin does not, as a matter of law, create a genuine issue of material fact. *Elrod v. Sears Roebuck & Co.*, 939 F.2d 1466, 1471 (11th Cir. 1991) ("Conclusory allegations of discrimination, without more, are not sufficient to raise an inference of pretext or intentional discrimination where [an employer] has offered . . . extensive evidence of legitimate, non-discriminatory reasons for its action."), *quoting*, *Carter v. City of Miami*, 870 F.2d 578, 585 (11th Cir. 1989); *Ramsey v. Leath*, 706 F.2d 1166, 1170 (11th Cir. 1983) (Summary judgment proper because plaintiffs "failed to present the district court with any evidence beyond their subjective beliefs, which alone did not constitute a material issue."). *See also*, *Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1081 (11th Cir. 1990) ("To survive summary judgment, the plaintiff must then present concrete evidence in the form of specific facts which show that the defendant's proffered reason is mere pretext. Mere conclusory allegations and assertions will not suffice.").

To the extent Wadibia asserts a disparate treatment claim in paragraphs 19 and 20 of his complaint, this claim relates

solely to Auburn's decision to place Wadibia, but not Holland, on administrative leave with pay pending an investigation into the confrontation between the two. The Court concludes that this claim fails. The Court agrees that Wadibia's paid leave could not reasonably be considered an adverse employment action so as to trigger federal anti-discrimination laws. *See e.g., Doe v. DeKalb County School District*, 145 F.3d 1441, 1449 (11th Cir. 1998) ("an employment action . . . is not adverse merely because the employee dislikes it or disagrees with it."). The Court also agrees that Wadibia has failed to establish that he and Holland were similarly situated relative to the episode between them, a confrontation which Wadibia admittedly initiated and described as "explosive." *See e.g., Holifield v. Reno*, 115 F.3d 1555, 1562 (11th Cir. 1997) ("In determining whether employees are similarly situated for purposes of establishing a prima facie case, it is necessary to consider whether the employees are involved in or accused of the same or similar conduct."). Finally, the Court agrees that, even if Wadibia had established a prima facie case of disparate treatment concerning the decision to subject him alone to paid leave pending the investigation, he has failed to establish that Auburn's explanation is false or pretextual and that the real reason is racial animus. *See, St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507-08, 113 S.Ct. 2742, 2747, 125 L.Ed.2d 407 (1993) (Once the employer has articulated a legitimate, non-discriminatory reason for its action, plaintiff must then establish "that the proffered reason was not the true reason for the employment decision."); *Walker v. Nationsbank of Florida*, 53 F.3d 1548, 1557 (11th Cir. 1995) (same).

Wadibia also alleges that he was retaliated against for filing a complaint with Auburn's AA/EEO Office on October 18, 1997 and his EEOC charge of discrimination on October 22, 1997. To establish a *prima facie* case of retaliation, Wadibia must show (1) a statutorily protected expression; (2) an adverse employment action; and (3) a causal link between the protected expression and the adverse action. *Raney v. Vinson Guard Service, Inc.*, 120 F.3d 1192, 1196 (11th Cir. 1997); *E.E.O.C. v. Reichhold Chemicals, Inc.*, 988 F.2d 1564, 1571-72 (11th Cir. 1993). The Eleventh Circuit has recently held "an employee who seeks protection under the opposition clause [of Title VII, 42 U.S.C. § 2000e-(3)a] must have a 'good faith, reasonable belief' that her employer has engaged in unlawful discrimination." *Clover v. Total System Services, Inc.*, __ F.3d __, 1999 WL 335389 (11th Cir. 1999), *quoting*, *Little v. United Techs., Carrier Transicold Div.*, 103 F.3d 956, 960 (11th Cir. 1997). "The objective reasonableness of an employee's belief that her employer has engaged in an unlawful employment practice must be measured against existing substantive law." *Id.*, *citing*, *Harper v. Blockbuster Entertainment Corp.*, 139 F.3d 1385, 1388 n. 2 (11th Cir. 1998) (failure to charge the employee who opposes an employment practice with substantive knowledge of the law "would eviscerate the objective component of our reasonableness inquiry").

Once the plaintiff establishes a *prima facie* case of retaliation, the employer must proffer a legitimate, non-discriminatory reason for the adverse employment action. *Raney*, 120 F.3d at 1196; *Reichhold Chemicals*, 988 F.2d at 1572. If the employer offers legitimate reasons, the plaintiff at the summary judgment stage must then submit evidence

sufficient to create a genuine factual issue as to whether the employer's proffered explanation is a pretext for retaliation. *Raney*, 120 F.3d at 1196-97.

As applied to the case at bar, Wadibia can at best only be said to have established that he was terminated in late January 1999, over a year after he filed his October 1997 complaints of discrimination. Any contention that he was denied tenure or that his student assignments diminished in retaliation for those complaints is purely specious. Even if the Court accepted the premise, which is does not, that Wadibia submitted sufficient evidence to establish that (1) his EEOC charges were based on his objectively reasonableness belief as "measured against existing substantive law" that his employer has engaged in an unlawful employment practice and (2) there existed a causal connection between those charges and his termination, Wadibia has failed to submit any evidence sufficient to create a jury issue as to whether the reasons stated by his employer, namely his substandard performance, inability to accept constructive criticism and lack of cooperation, were a pretext for retaliation. Consequently, defendants are entitled to judgment as a matter of law on the retaliation claim.

Wadibia also asserts a state law claim for breach of contract which he essentially admits is barred by the Eleventh Amendment to the extent it is asserted against Auburn, a state agency.[7] Wadibia urges, however, that the claim should be viable against Dr. Evans, the individual defendant, merely because he "is not so protected [by the Eleventh Amendment]

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7. Wadibia has failed to cite any legal authority by which such a claim against Auburn would not be held so barred.

in his individual capacity." Wadibia Brief in Opposition at 9. Wadibia has, however, failed to proffer any evidence to support this claim as against Evans. Although Wadibia did have a contract with Auburn, he did not have a contract with Dean Evans in his individual capacity and the contract with Auburn did not entitle him to tenure absent his satisfaction of certain conditions precedent.

Similarly, Wadibia's state law claim for outrageous conduct and intentional infliction of emotional distress is barred by the Eleventh Amendment as to both Auburn and Evans in his official capacity and is nonetheless without evidentiary support. For a plaintiff to recover under the tort of outrage, he must prove: "(1) that the defendant either intended to inflict emotional distress, or knew or should have known that emotional distress was likely to result from its conduct; (2) that the defendant's conduct was extreme and outrageous; and (3) that the defendant's conduct caused emotional distress so severe that no reasonable person could be expected to endure it." *Sphere Drake Ins., P.L.C. v. Shoney's, Inc.*, 923 F.Supp. 1481, 1491 (M.D. Ala. 1996), *quoting*, *Jackson v. Alabama Power Co.*, 630 So.2d 439, 440 (Ala. 1993). *See also*, *Perkins v. Dean*, 570 So.2d 1217, 1219 (Ala. 1990) (same); *Green Tree Acceptance, Inc. v. Standridge*, 565 So.2d 38, 44 (Ala. 1990) ("In order to support a cause of action for the tort of outrage, the conduct complained of must be so extreme in degree as to go beyond all possible bounds of decency and be regarded as atrocious and utterly intolerable in a civilized society."). The determination as to whether a statement or action is sufficiently extreme or outrageous to support a cause of action for outrageous conduct is, in the first instance, one

for the trial court to make as a matter of law. *Grimsley v. Guccione*, 703 F.Supp. 903, 907 (M.D. Ala. 1988), *citing*, *Logan v. Sears, Roebuck & Co.*, 466 So.2d 121, 123 (Ala. 1985) and *American Road Service Co. v. Inmon*, 394 So.2d 361, 365 (Ala. 1980).

Wadibia bases his outrage claim on the same allegations that form the basis of his other claims. He has cited no case in which the Alabama Supreme Court has held that the type of conduct about which he complains constitutes outrageous conduct. Moreover, he has presented no evidence from which this Court or a jury could find extreme or aggravated conduct much less conduct which goes beyond "all possible bounds of decency" or could be characterized as "atrocious and utterly intolerable in a civilized society." Accordingly, defendants are entitled to summary judgment on this the only remaining state law claim.

Inasmuch a Wadibia has failed to address any other of the arguments made by the defendants in support of summary judgment, the Court concludes that Wadibia does not oppose summary judgment on any of his other claims or assertions in this litigation.

CONCLUSION AND ORDER

For the reasons stated above, the Court concludes that no genuine material issue of fact exists and that the defendants are entitled to judgment as a matter of law. It is therefore **ORDERED** that defendants' motion for summary judgment (Doc. 20) be and is hereby **GRANTED** and that **JUDGMENT** be entered in favor of the defendants, Auburn

Appendix B

University and R. Lee Evans, and against the plaintiff, E. Chuma Wadibia, said plaintiff to have and recover nothing of the defendants. Costs are taxed against the plaintiff.

DONE this 26th day of August, 1999.

s/ [illegible]
SENIOR DISTRICT JUDGE

Appendix B

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION NO.
98-0722-BH-M

E. CHUMA WADIBIA,

Plaintiff,

v.

AUBURN UNIVERSITY, et al.,

Defendants.

JUDGMENT

It is **ORDERED, ADJUDGED** and **DECREED** that defendants' motion for summary judgment (Doc. 20) be and is hereby **GRANTED** and that **JUDGMENT** be and is hereby entered in favor of the defendants, Auburn University and R. Lee Evans, and against the plaintiff, E. Chuma Wadibia, said plaintiff to have and recover nothing of the defendants. Costs are taxed against the plaintiff.

DONE this 26th day of August, 1999.

s/ [illegible]
SENIOR DISTRICT JUDGE

APPENDIX C — PER CURIAM ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED APRIL 25, 2000

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 99-13649-CC

E. CHUMA WADIBIA,

Plaintiff-Appellant,

versus

AUBURN UNIVERSITY, R. LEE EVANS,
in his individual and official capacities,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of Alabama

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, __ F.2d __).

Before: BIRCH, DUBINA and CARNES, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the

Appendix C

Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ Joel F. Dubina
UNITED STATES CIRCUIT JUDGE

Supreme Court, U.S.
FILED
AUG 25 2000
CLERK

(2)

No. 00-141

In The

Supreme Court of the United States

E. CHUMA WADIBIA,

Petitioner,

v.

AUBURN UNIVERSITY, R. LEE EVANS, in his individual and official capacities,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Defendants-Respondents Auburn University and R. Lee Evans[1] respectfully request that this Court deny the petition herein for a writ of certiorari for review of the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered on January 25, 2000.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

On July 10, 1998, Petitioner E. Chuma Wadibia ("Wadibia") filed suit in the United States District Court for the Southern District of Alabama against Auburn University ("Auburn") and R. Lee Evans, Dean of Auburn's School of Pharmacy. Wadibia alleged that, in violation of Title VII, 42 U.S.C. § 2000e and 42 U.S.C. § 1981, he was discriminated against on the basis of race and national origin in that he was subjected to a racially hostile environment and that he was retaliated against for complaints of alleged discrimination and harassment. Wadibia further alleged that his fifth and fourteenth amendments rights were violated when he was placed on administrative leave with pay pending an investigation into an altercation between him and a co-employee. On

[1] Dean Evans was named as a defendant in the complaint and was dismissed on summary judgment. Wadibia's appeal to the Eleventh Circuit did not include Dean Evans, but only Auburn University.

May 17, 1999, the district court granted Wadibia's motion to amend the complaint to allege that Wadibia was terminated effective February 10, 1999 in retaliation for filing a charge of discrimination with the Equal Employment Opportunity Commission and filing suit against Auburn. Neither the original complaint nor the amended complaint alleged that Wadibia was terminated because of race or national origin. See Appendix 3-5; Petitioner's Appendix B at 3a, 25a-25b.

On August 26, 1999, the district court ordered that the defendants' motion for summary judgment be granted in its entirety and that the action be dismissed. Wadibia appealed the following claims to the United States Court of Appeals for the Eleventh Circuit: (1) the Title VII disparate treatment claim as to Wadibia's being placed on administrative leave during Auburn's investigation into his altercation with a co-employee; (2) the hostile environment claim – which was premised on one alleged racial slur by a co-employee; and (3) the retaliation claim, which was premised on the reassignment of one student during the time Wadibia was on paid administrative leave and Wadibia's termination more than one year after he allegedly engaged in protected activity. Through his new appellate counsel, Wadibia raised in the Eleventh Circuit a claim he did not make in the district court – a claim that his termination was racially motivated. Wadibia did not appeal the dismissal of the claims against R. Lee Evans. On January 25, 2000, the Eleventh Circuit "affirm[ed] the district court's judgment based on its well-reasoned order filed on August 26, 1999." Appendix 2; *Wadibia v. Auburn University*, 208 F.3d 1013 (2000)

(table). Wadibia filed a petition for rehearing or rehearing en banc which was denied on April 25, 2000. *Id.*

B. Statement of Facts

A thorough statement of the facts is set out in the district court's summary judgment decision. Petitioner's Appendix B at 3a-19a.

Wadibia, a native of Nigeria, was employed by Auburn as an Assistant Professor in the School of Pharmacy beginning July 1, 1996. He was assigned to work in Mobile, Alabama at the University of South Alabama College of Medicine ("South Alabama"), with which Auburn's School of Pharmacy had a cooperative program. In this program, Auburn pharmacy students gain clinical experience under the supervision of Auburn faculty, like Wadibia. In addition to supervising Auburn students, the Auburn faculty work with South Alabama medical faculty on clinical pharmacy and collaborative research matters. Wadibia in particular was assigned to precept two students for approximately 35 weeks each year and, among other responsibilities, to work with South Alabama's Department of Cardiology.

Wadibia's Auburn faculty colleagues in Mobile were concerned about his competence almost from the time of his arrival. Within months, students and faculty began reporting to Dr. Robert Smith, Wadibia's Department Head, their complaints and concerns about Wadibia, including that Wadibia was giving incorrect information to students and medical teams. Wadibia offered no evidence to dispute that such complaints were made or that

Auburn had reason to be concerned about his performance. Petitioner's Appendix B at 7a ¶¶ 9, 10.

In the summer of 1997, Wadibia failed to prepare properly for the arrival of his students, who had to be taken care of by a faculty colleague. This colleague, Dr. Eileen Holland, received complaints about Wadibia throughout the summer, which she reported to Department Head Smith. Wadibia presented no evidence that such complaints were not made or that they were not communicated to the administration.

In September of 1997, the Auburn faculty working at South Alabama began having weekly meetings, and Dr. Holland, as the senior faculty member, was designated coordinator. One of the purposes of the meetings was to hear presentations from students. Wadibia did not dispute that he frequently missed these meetings or left early.

The first student to appear at the weekly meetings was L.A., one of Wadibia's students. The student's presentation was quite poor and the faculty agreed that significant improvement would be required if the student expected to complete the rotation successfully. Dr. Holland volunteered to work with L.A. and, in the course of subsequent discussions with Wadibia, Wadibia admitted that he was not going on rounds with the student, who was – against the faculty's instructions – being allowed in patient care situations without supervision.

Another faculty meeting was held soon thereafter, at which the faculty discussed their recent activities. Wadibia was asked about his work, including efforts he had made to assist L.A., who was scheduled to make another

presentation at that day's meeting. During L.A.'s presentation, Wadibia told Holland that he needed to speak with her outside. Holland followed Wadibia out of the room. Wadibia then confronted Holland and told her that she was not his supervisor, that she had no right to question him about his activities or his students, and that if she had a problem with Wadibia she should talk to Dr. Smith, the Department Head. Holland told Wadibia that she was concerned about Auburn's students and that she had already spoken with Smith and communicated her opinion that Wadibia was incompetent and not providing a good educational experience for the students. Holland told Wadibia that she needed to return to the presentation and that the hallway was not the place to have such a discussion. Wadibia told Holland he was not finished with her, then moved towards her, continuously shaking his finger in her face. Holland later reported to Smith that Wadibia "got right in [her] face," "gritted his teeth" at her, "hissed and grunted" at her, and called her an "idiot fool." According to Holland, Wadibia acted in a threatening and violent manner, came very close to having physical contact with her, knocked a bulletin board off the wall, and was generally out of control. Shortly after this confrontation, Holland reported to Smith and others that she was in fear for her safety. Smith believed Holland was genuine and sincere in her concern.

The following day, Smith spoke with Wadibia, who confirmed that the confrontation with Holland had occurred. Wadibia added that, during the confrontation, Holland had referred to him as "nigger boy." Holland adamantly denied making the alleged comment. Smith consulted with Dr. Lee Evans, Dean of the School of

Pharmacy. Not knowing exactly what had happened or who was at fault, Evans and Smith decided that, in everyone's best interest, Wadibia should be temporarily removed from the workplace while an investigation of the incident was conducted. On October 17, 1997, Wadibia was placed on "Administrative Leave with Pay."

After carefully reviewing the information secured through his investigation, Smith concluded that, while Wadibia had initiated the incident and acted improperly toward Holland, there was no substantial likelihood that Holland would be in danger of future physical harm from Wadibia. Smith determined that the altercation was a one-time event precipitated by Wadibia's perception that Holland was improperly interfering with the instruction of his students. Because Wadibia was adamant that Holland had used a racial slur, and Holland was just as adamant that she had not, Smith made no determination on that issue. Smith counseled Holland that racial slurs in the workplace would not be tolerated.

No disciplinary or other adverse personnel action was taken against Wadibia as a result of the confrontation with Holland. He suffered no loss of pay or benefits, he was advised that he could return to work, and he did so with all his previous responsibilities and without any restrictions. Wadibia admits he had no further problems with Holland after he returned from administrative leave with pay.

Wadibia claims that Auburn retaliated against him by reassigning his students during the period of time he was on leave. The only student assigned to Wadibia at that time was L.A, who had approximately six days left on her

cardiology rotation when she was reassigned to Holland, from whom L.A. was already seeking assistance. Wadibia offered no evidence that any other student supervised by him was reassigned during the administrative leave or thereafter. Wadibia offered no evidence that Auburn did anything to prevent students from self-selecting Wadibia as their preceptor.

A few days after his temporary leave began, Wadibia filed a complaint with Auburn's AA/EEO office. He alleged that, in connection with the Holland incident and the resulting leave, he was being subjected to racial harassment and workplace discrimination. Following an investigation, the AA/EEO office advised Wadibia that it

> could find no evidence to support [his] allegation that [Holland's] treatment of [Wadibia] was in any way negatively influenced by [his] race. It is my opinion that Dr. Holland has not violated the University's policy prohibiting discrimination on the basis of race. With regard to the complaint against the School of Pharmacy, I could find no evidence that your temporary administrative leave was related to your race.

In early January 1998, Smith contacted Wadibia to discuss how things were going. Wadibia inexplicably warned Smith "not to try anything." Smith advised Wadibia in writing that Wadibia's "warning" was totally inappropriate and unprofessional. During the following several months, Dr. Smith and Dean Evans continued to monitor Wadibia's work performance, which remained sub-standard. They began to discuss the possibility that

Wadibia might have to be noncontinued due to his continued performance deficiencies and uncooperative attitude. Dean Evans and Dr. Smith sought advice from Auburn University counsel about the matter because of their increasing concerns about Wadibia.

On June 1, 1998, Smith met with Wadibia to evaluate Wadibia's performance for the prior academic year. Wadibia refused to accept Smith's assessment. Instead, Wadibia made numerous threatening statements, including a threat of negative publicity for the University, as well as Smith personally, if Smith evaluated Wadibia's performance at a level lower than Wadibia believed he deserved. Wadibia even suggested that Smith's family would not be able to survive if forced to live on Smith's wife's low salary alone. Upon his return to Auburn, Smith advised Wadibia in writing that Wadibia's behavior and comments during this meeting constituted insubordination. Wadibia was also advised that further threats would not be tolerated and that he would have to learn to respond positively to constructive criticism.

In the meantime, Dean Evans and Dr. Smith continued their discussions about whether Wadibia's employment should be terminated. In early July of 1998, no final decision had been made. On July 9, 1998, consistent with his standard practice for faculty in the Department, Smith sent a letter following up on his early June meeting with Wadibia. Smith explained that Wadibia's attitude in the June meeting had made it impossible to discuss various performance issues, and went on to set out the areas in which Wadibia would be required to improve his performance. Wadibia was advised that, in addition to improving his teaching, research, and relationships with faculty

and colleagues, he must accept constructive criticism. Wadibia was reminded that, under Auburn's policy, a third year or mid-tenure review would be conducted prior to his thirty-second month of employment. Smith offered to help Wadibia prepare his review materials.

Later in July, after literally months of deliberation, Dean Evans and Dr. Smith finally came to the conclusion that Wadibia's performance and willingness to cooperate were so deficient that, without prompt and drastic improvement, his employment would have to be terminated. Aware of the advance notice required to noncontinue a tenure-track faculty member, they decided upon a course of action that would give Wadibia a "last chance" while also protecting the interests of Auburn and its students. Accordingly, on July 31, 1998, Wadibia was advised in writing that his contract with Auburn would not be continued after January 31, 1999. Wadibia was also told, however, that if he were to make satisfactory improvements in specified areas, his noncontinuation might be reconsidered. Wadibia does not dispute that he was instructed to submit documentation of his interactions and activities with Auburn faculty as well as the Pharmacy Director and to provide Smith with a monthly written report of his efforts to improve. Wadibia admits that he failed to submit this documentation.

In addition to failing to submit the documentation required under the July 31, 1998 letter, Wadibia also failed to modify his performance. Smith attempted to meet or speak with Wadibia on several occasions to discuss Wadibia's performance. Wadibia admits that he consistently refused to meet or speak with Smith.

In October 1998, Smith requested that Wadibia meet with him to discuss his goals for the 1998-99 academic year and to discuss preparation of the material for the third-year review, which would occur in February or March 1999. Smith suggested that Wadibia prepare this information in the event that his noncontinuation were reconsidered. Because the review would occur in February or March, 1999, it would be all but impossible for Wadibia to prepare information between the time his noncontinuation was reconsidered and the third-year review.

Wadibia refused to meet with Smith until November 1998. During this meeting, Smith explained the purpose of the third-year review and that it would be conducted only if the noncontinuation decision were reconsidered. Smith believed that, if Wadibia's performance improved, the information gathered for the third-year review might help Wadibia demonstrate sufficient improvement to justify reconsideration of his noncontinuation. Smith also gave Wadibia specific suggestions for improvement. Smith repeatedly expressed regret that Wadibia had failed to meet with Smith sooner to address the deficiencies outlined in the July 1998 letter. Smith and Wadibia met again on December 1, 1998. Smith told Wadibia that, while it appeared that Wadibia was making some progress in addressing some of the deficiencies outlined in the July 1998 letter, he had not made sufficient progress and that his refusal to initiate this process sooner might prevent him from making sufficient progress to justify reconsideration of his noncontinuation. Smith again gave Wadibia specific suggestions for improvement.

In late January 1999, Dean Evans, with the input of Dr. Smith, reviewed Wadibia's performance since the July 1998 notice of noncontinuation was issued. Wadibia had failed to improve his performance in the specified areas, failed to provide the required documentation, and engaged in repeated acts of insubordination and unprofessional behavior. As a result, the University terminated Wadibia's employment effective February 10, 1999.

During the time Wadibia was employed, students were allowed to select the site of their clinical rotation and their faculty supervisor. Student preferences were accommodated to the extent possible. The evidence was undisputed that Wadibia received poor evaluations from students regarding his clinical rotation and teaching. Students frequently complained of Wadibia's arrogance and lack of concern for students. Wadibia's lack of students was attributable to the manner in which he conducted himself and his resulting poor reputation among students.

Wadibia argues on page seven of his petition that he established pretext because he "presented evidence that his teaching evaluations were not the lowest; other white employees had lower evaluations; and Smith testified that Wadibia's scholarship was in fact average." In fact, students evaluated Wadibia as follows:

> There is absolutely no reason for Dr. Wadibia or someone like Dr. Wadibia to be on the Auburn faculty.
>
> He is stubborn – which is evidenced in his arrogant responses to our challenges . . . I honestly think he should not teach at this school – he is

> not good enough to earn a position in this school.
>
> Dr. Wadibia had the most awful lecture and test of the quarter . . . We pay entirely too much money to have to suffer with such a poor quality of lecture . . . Dr. Wadibia seems to be an intelligent person, but he is a weak point in the program at Auburn.
>
> Dr. Wadibia should *not* be teaching. He *cannot* convey material where the students can understand. When questions are asked he cannot relate the material. He also had a hard time writing questions that were not ambiguous. My overall opion [sic] of Dr. Wadibia as an instructor is extremely poor. I will do my best to never have him as an instructor/preceptor again.

In contrast, the only evidence Wadibia could adduce to "support" his teaching performance was that, in an evaluation of two courses, he ranked 12th out of 13 faculty in the Department, and thus was not the poorest in the faculty.

Auburn does not dispute that Smith found Wadibia's scholarship, to the extent it existed, to be worthwhile, in the sense that it was not "at the bottom." This does not mean, however, that Auburn was satisfied with Wadibia's research efforts. As Smith explained on deposition, Wadibia had repeatedly been advised to seek and secure extramural funding. In two and one half years, Wadibia failed to obtain even one clinical drug study.

SUMMARY OF ARGUMENT

Wadibia argues that the decisions below cannot be squared with *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). He claims that he presented sufficient evidence of the falsity of the reasons articulated by Auburn for its adverse personnel actions to warrant a jury trial on the question of Auburn's discriminatory intent, and that *St. Mary's* requires that outcome. Review is not warranted in this case, however, for two very basic reasons. First, the district court concluded that Wadibia failed to establish a prima facie case of discrimination or retaliation, such that it was not necessary to even reach the pretext issue and apply *St. Mary's*. While the district court did address the pretext issue in the alternative, it did not misapply or ignore *St. Mary's*, which would govern only where there is substantial evidence calling into question the veracity of the employer's explanation. Wadibia adduced no evidence of falsity of Auburn's explanation for the actions taken against Wadibia, *St. Mary's* was therefore not implicated, and Wadibia's pretext argument simply failed for lack of proof.

Wadibia also seeks review based on the contention that the Eleventh Circuit's decision conflicts with prior decisions of that same circuit. Intra-circuit conflicts do not, however, warrant certiorari review by this Court. Wadibia's substantive argument is that summary judgment was improperly granted because Auburn based its decision to terminate Wadibia strictly on subjective criteria. Even if such a sweeping generalization were the law – which it is not – Auburn's decision was actually based on

a number of grounds, several of which were non-subjective. In any case, Wadibia did not make a claim for racially motivated termination in the district court, which is another basis for denying certiorari.

Wadibia essentially seeks certiorari review to have this Court correct perceived error by the district court and the Eleventh Circuit in applying settled rules of law. As stated in this Court's Rule 10, this is not a basis for granting certiorari.

ARGUMENT

The considerations governing review by this Court on a petition for writ of certiorari are set forth in Rule 10 of the Rules of the Supreme Court of the United States. Neither of the questions presented for review by Petitioner meets the criteria contained in Rule 10. Thus there is no reason for the Court to review this case.

This Court's Rule 10 provides as follows:

Rule 10: Considerations Governing Review on Certiorari

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> > (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of

> appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

I. There is No Conflict Between the Decision Below and This Court's Decision in *St. Mary's Honor Center v. Hicks.*

As the first basis for his petition, Wadibia argues that the Eleventh Circuit's decision "cannot be squared with Supreme Court precedent," Petition at 4, namely *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 125 L.Ed.2d 407 (1993). Petition at 4-6. In *St. Mary's*, this Court addressed the question whether, in a suit against

an employer alleging intentional race discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, the trier of fact's rejection of the employer's asserted reasons for its actions mandates a finding for the plaintiff. *Id.*, 509 U.S. at 504. This Court answered this question in the negative, concluding that rejection of the proffered reasons *permits* the trier of fact to infer the ultimate fact of intentional discrimination, without additional evidence, but does not *compel* such a finding. *Id.*, 509 U.S. at 511. As this Court explained, the Title VII plaintiff at all times bears the "ultimate burden of persuasion." *Id.*

Wadibia invokes *St. Mary's* for the proposition that, on a disparate treatment claim based on circumstantial evidence, a plaintiff's evidence tending to prove the falsity of an employer's proffered reason for a challenged adverse employment action is in and of itself enough to survive summary judgment. Petition at 5. Wadibia's argument suggests (incorrectly) that he presented sufficient evidence to cast doubt on the veracity of Auburn University's explanations for "the adverse employment actions," and was therefore "entitled to have a trier of fact determine whether the falsity of the proffered reason, alone, is sufficient evidence to conclude that [Auburn] unlawfully discriminated." *Id.*

In the abstract, Auburn does not disagree with the proposition that, in appropriate circumstances, the trier of fact can reasonably infer from the falsity of the employer's explanation that "the employer is dissembling to cover up a discriminatory purpose." *Reeves v. Sanderson Plumbing Prod.*, ___ U.S. ___, 120 S.Ct. 2097, 147 L.Ed.2d 105, 120 (2000). The present case is not one,

however, where these principles drawn from *St. Mary's* and *Reeves* even come into play, and therefore the arguments advanced by Wadibia for review by this Court are baseless.

The only claims to which Wadibia's argument could apply are (i) Wadibia's disparate treatment claim that his colleague, Dr. Holland, was not suspended following their altercation while he was, and (ii) his retaliatory discharge claim.[2] On neither claim did the district court commit error, either through failing to properly apply *St. Mary's* or otherwise.

A. Petitioner's Suspension Claim Was Properly Rejected Because of Lack of Proof, Not Because of Any Misapplication of *St. Mary's*.

Wadibia's argument based on *St. Mary's* could come into play only if there has been an adverse personnel action, a showing of a prima facie case, and the employer's ensuing articulation of its legitimate, non-discriminatory reason for the adverse personnel action. *See St. Mary's*, 509 U.S. at 506-09. On the claim involving his temporary paid suspension, which Wadibia claimed to have been racially motivated, the district court concluded that Wadibia established no prima facie case because he failed to show (i) any adverse employment action sufficient to trigger the federal anti-discrimination laws, or (ii) that he and Dr. Holland were similarly situated, given

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[2] As discussed in the Statement of the Case and in a later section of the argument, Wadibia made no claim in the district court for racially motivated termination.

that Wadibia was the acknowledged instigator of the episode, which he himself termed "explosive." Petitioner's Appendix B at 26a. Thus, the claim was rejected on grounds and at a stage of the analysis making it unnecessary for the district court to even consider the pretext issue of whether Wadibia had cast sufficient doubt on the veracity of Auburn's articulated reasons to warrant denial of summary judgment. Therefore, even though the district court went on to address the pretext question in the alternative, that basis for the decision below was unnecessary and is not a reason for this Court to grant certiorari.

If the pretext issue relating to the suspension claim were reviewed on the merits, this Court would see that the district court did not misapply *St. Mary's*. Contrary to the suggestions in his petition, Wadibia did *not* come forward with any evidence tending to cast doubt on the truthfulness of the reason proffered by Auburn for the temporary suspension (its concern that Wadibia may have engaged in unnecessarily aggressive conduct toward a colleague and its belief that he should be removed from the workplace temporarily to facilitate the investigation of the incident). It is more than noteworthy that the petition before this Court fails to identify any evidence of pretext offered by Wadibia below. The petition states only in the most conclusory terms that "Wadibia further presented evidence that [Auburn's] proffered reasons for their acts were false. . . . " Petition at 3. The simple fact is that there was no such evidence.

The district court did not misapply or fail to apply *St. Mary's*, as Petitioner contends. Instead, the court rejected Petitioner's suspension claim on another basis, and, in

addressing the pretext argument in the alternative, correctly concluded that the argument simply failed for lack of evidence. The first reason for granting certiorari advanced by the Petitioner – an irreconcilable conflict with *St. Mary's* – is therefore baseless.[3]

B. Petitioner's Retaliation Claim Was Dismissed for Failure of Proof and Not for Reasons Inconsistent with *St. Mary's*.

The second claim on which the *St. Mary's* pretext issue could have arisen is Wadibia's claim of retaliatory discharge. In rejecting this claim, the district court concluded that Wadibia had not only failed to establish a prima facie case of retaliation,[4] he had in any event also failed to submit evidence sufficient to create a jury issue as to pretext.[5] Petitioner's Appendix B at 28a.

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[3] The commentators observe that, to warrant review on certiorari, a case must present a *clear* conflict with Supreme Court precedent. *23 Moore's Federal Practice*, § 510.42[1] (Mathew Bender 3d ed.). Even if *St. Mary's* were in the picture, this case presents no *clear* failure to follow it.

[4] "Even if the court accepted the premise, *which it does not*, that Wadibia submitted sufficient evidence to establish that (1) his EEOC charges were based on his objectively reasonableness [*sic*] belief as "measured against existing substantive law" that his employer has engaged in an unlawful employment practice and (2) there existed a causal connection between those charges and his termination. . . . " Petitioner's Appendix B at 28a (emphasis added).

[5] The district court also rejected Petitioner's retaliation claim on the basis that, even if Petitioner had engaged in protected conduct that somehow affected the termination decision, "the same employment decision would have been

Auburn had ample reasons for discharging Wadibia that it articulated in the district court. He was sharply criticized by students and his faculty colleagues for poor performance and lack of professionalism. He ignored numerous requests and instructions from his supervisor to meet and discuss his performance deficiencies, electing instead to threaten his supervisor and his employer. His teaching and research were unacceptable, as evidenced by student evaluations and the fact that Wadibia failed to obtain funding for even one clinical drug study. Wadibia even failed, when given a last chance to improve, to submit documentation of improved performance. Had there been substantial evidence offered by Wadibia tending to show that *each* of the proffered reasons for Wadibia's discharge was false, *St. Mary's* would arguably have required a jury trial. Wadibia's only evidence, however, was that he was not rated the poorest teacher in the Department, that his scholarship was not "at the bottom," and that by his own self-assessment he had met the performance improvement goals required of him. Wadibia offered nothing to challenge the veracity of Auburn's reasons relating to the student evaluations, his threats against his supervisor, his poor research performance, his refusal to meet with his supervisor to discuss his performance, or his refusal to provide documentation of his

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made for legitimate reasons unrelated to . . . these complaints." Petitioner's Appendix B at 19a. Thus, even if Petitioner were correct in his *St. Mary's* contentions, the same result – summary judgment in favor of Auburn – would have prevailed. *See Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977); *Tanca v. Nordberg*, 98 F.3d 680 (1st Cir. 1996), *cert. denied*, 520 U.S. 1119 (1997).

efforts to improve his performance. If there had been more evidence that Auburn's stated reasons were false, surely it would be mentioned in the petition for certiorari. *See* Petition at 3 (stating only in conclusory terms that Petitioner "presented evidence that [Auburn's] proffered reasons . . . were false."). Wadibia's retaliatory discharge claim was dismissed on summary judgment not because of a misapplication of *St. Mary's*, but because he submitted insufficient proof of pretext.[6]

II. There is No Basis for Certiorari Review of Petitioner's Purported Claim of Racially Motivated Termination.

A. The Court Does Not Review Claims That Were Not Asserted Below.

Wadibia urges this Court to review his supposed claim that "race discrimination motivated his termination." Petition at 7. As discussed earlier, Wadibia made no such claim in the district court. Appendix 3-5; Petitioner's Appendix B at 3a, 25a-25b. It is a well-settled general rule that this Court will not grant certiorari to decide an issue that was not raised in the proceedings below. *See Ernst &*

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[6] If Wadibia is asking this Court to review some other retaliation claim, such as his contention that students were taken from his supervision in retaliation for his filing an EEOC charge, *see* Petition at 3, he fails completely to identify any evidence that Auburn took such action or that Auburn's explanation for anything it did relating to students was false or otherwise pretextual. As explained in the accompanying text, the petition makes broad statements, but identifies no evidence that was placed before the district court.

Ernst v. Hochfelder, 425 U.S. 185, 194 n.13, 96 S.Ct. 1375, 47 L.Ed.2d 668, *reh'g denied*, 425 U.S. 986 (1976); *23 Moore's Federal Practice*, § 510.41[3][e][ii] (Mathew Bender 3d ed.)

B. Certiorari Is Not to be Granted to Review Alleged Conflicts Between Panels in the Same Federal Circuit.

Even if the claim of race-based termination had been made below, there is still no basis for certiorari review. Wadibia seeks such review based on the argument that "[t]he decision below also conflicts with previous opinions of the Eleventh Circuit." Petition at 6. Wadibia then argues at some length that the Eleventh Circuit's decision herein is inconsistent with other decisions from that same court which Wadibia interprets to stand for the proposition that employment decisions based solely on the application of subjective criteria are inherently suspect and not subject to disposition on summary judgment. *Id.* at 6-7.

Nothing in this Court's Rule 10 suggests that review by certiorari is appropriate where the challenged decision by a court of appeals is alleged to be inconsistent with earlier decisions of that same court. Rule 10 discusses certiorari review of a decision by a United States court of appeals that conflicts with a decision of *another* federal court of appeals on the same important matter, Rule 10(a); a decision by a court of appeals on an important federal question that conflicts with a decision of a state court of last resort, *id.*; and a decision by a United States court of appeals that conflicts – on an important federal question – with a relevant decision of this Court. Rule 10(c). Rule 10 does not mention, however, review based

on allegedly conflicting decisions *within the same circuit. See 23 Moore's Federal Practice*, § 510.21[2], *citing Harlan, Manning The Dikes*, 13 Record of N.Y.C. Bar Ass'n 541, 552 (1958) ("Likewise, contrary decisions between different panels of the same Court of Appeals will not be considered to present a reviewable conflict, since such differences of view are deemed an intramural matter to be resolved by the Court of Appeals itself."); *Wisniewski v. United States*, 353 U.S. 901, 902, 77 S.Ct. 633, 1 L.Ed.2d 658 (1957) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

Wadibia's effort to secure review by this Court of this case, on the basis that the Eleventh Circuit has disagreed with itself, is unavailing.

C. The Decision to Terminate Petitioner Was Not Based Strictly on Subjective Criteria.

Even if this Court were to review Petitioner's newly asserted claim for racially discriminatory discharge, there would be no basis for a reversal of the summary judgment order. First, there is no rule of law that summary judgment is *per se* inappropriate where the reasons for the adverse employment action are based purely on subjective criteria. *See Chapman v. AI Transport*, 180 F.3d 1244, 1249-50 (11th Cir. 1999). In addition, the legitimate reasons for Wadibia's discharge articulated by Auburn were *not* all based on subjective criteria, and thus Wadibia's basic premise is flawed. Among the non-subjective reasons for Wadibia's termination which would have been completely sufficient in and of themselves were the written student evaluations, Wadibia's repeated refusal to

meet with his supervisor, his threats against Auburn and his Department Head, his failure to secure research funding, and his decision not to submit documentation of his work and efforts to improve his performance. Thus the very premise which underlies Wadibia's argument – that decisions were made based on subjective criteria and are thus inherently suspect – must be rejected.

CONCLUSION

Wadibia advances no legitimate basis for this case to be reviewed on certiorari. He argues that the decisions below conflict with *St. Mary's*, but that case is essentially irrelevant because (i) the district court disposed of this case for reasons which made any analysis of pretext unnecessary and (ii) Wadibia did not provide the district court with substantial evidence that Auburn's stated reasons for its actions were untruthful or otherwise pretextual. Wadibia is essentially asking this Court to correct what he perceives as error by the district court and Eleventh Circuit in applying settled rules of law which, under Rule 10, is not a normal basis for granting certiorari.

Wadibia's second argument is that review is appropriate to address a conflict *within* the Eleventh Circuit, but certiorari is not ordinarily granted on such grounds. In any event, the proposition on which the alleged intra-circuit conflict is based – that employment decisions based on subjective criteria are inherently suspect and that challenges to such decisions cannot be defeated at the summary judgment stage – is not supported by the undisputed facts in this case. There is, moreover, another

compelling reason for denying certiorari. Wadibia seeks review of a claim – racially motivated termination – that was not asserted in the district court.

For the foregoing reasons, the petition for certiorari is due to be denied.

Respectfully submitted,

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-13649
Non-Argument Calendar

D.C. Docket No. 98-00722-CV-BH-M

E. CHUMA WADIBIA,

Plaintiff-Appellant,

versus

AUBURN UNIVERSITY,
R. LEE EVANS, in his individual
and official capacities,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Alabama

(January 25, 2000)

Before BIRCH, DUBINA and CARNES, Circuit Judges.

PER CURIAM:

Appellant E. Chuma Wadibia ("Wadibia") appeals the district court's grant of summary judgment in favor of the defendants on Wadibia's claims of race and national origin discrimination and retaliation under Title VII of the Civil Rights Act of 1964, as amended, and supplemental state law claims for breach of contract and intentional infliction of emotional distress.

This court reviews a grant of summary judgment *de novo*. *See Korman v. HBC Florida, Inc.*, 182 F.3d 1291, 1293 (11th Cir. 1999).

After reviewing the record, we conclude the district court correctly granted summary judgment in favor of the defendants. Accordingly, we affirm the district court's judgment based on its well-reasoned order filed on August 26, 1999.

AFFIRMED.

Excerpts from Plaintiff's Amended Complaint

* * *

CAUSES OF ACTION

A. RACIAL DISCRIMINATION

19. The act of Defendants allowing a racially hostile environment, and their failure to discipline the Caucasian employee who created the hostile environment, and their threat of denying your Plaintiff tenure, along with the racial epithets, indicates a policy of Defendant to discriminate against Blacks on the basis of race and is evident of disparate treatment in the work place. Plaintiff asserts that had he been a Caucasian employee, he would not have been subjected to such hostility and would have not been treated in such derogatory manner.

B. NATIONAL ORIGIN DISCRIMINATION – TITLE VII

20. Your Plaintiff is a native of Nigeria, Africa. Your Plaintiff has a heavy accent, but speaks the English language fluently. Your Plaintiff asserts that he was being harassed by his co-worker based upon his national origin. Your Plaintiff maintains that had he not been a Nigerian, he would not have had to endure such hostile treatment.

C. RETALIATORY DISCRIMINATION

21. During the course of his employment, your Plaintiff experienced retaliation by his supervisor and Defendant

Evans. Your Plaintiff went to his supervisor and complained that a co-worker was harassing him. Defendant Evans blamed your Plaintiff and stated that he was being placed on administrative leave and that he would be investigated. Thereafter, your Plaintiff's student enrollment in his class dropped considerably and was told that he wouldn't be tenured. Furthermore, prior to the EEOC complaints, your Plaintiff's evaluation was excellent. However, subsequent to the EEOC complaints, your Plaintiff received an evaluation which is confusing and demeaning and which places your Plaintiff in a false light. Your Plaintiff asserts that he engaged in a prior protected activity [filing EEOC complaints]; that Defendant Evans knew of the complaints; and that there is a causal connection with the acts of the defendants and the filing of his complaints. Your Plaintiff strongly asserts that he was treated in such hostile manner since he complained about the harassment he had endured in the workplace.

22. Next, your Plaintiff asserts retaliatory discrimination as a direct result of filing this lawsuit. Your Plaintiff asserts that this lawsuit was filed July 10, 1998. Defendant Evans became aware of the lawsuit when he was personally served with notice of the pending action. Thereafter, in February 1999 and during the pendency of this lawsuit, Defendant Evans terminated my employment based upon poor performance. Plaintiff asserts that said reason is simply pretextual since the mid-term binder [used for evaluation purposes of tenured track professors] had not been given adequate consideration by

Plaintiff's supervisor, Robert Smith and his student clerkship enrollment was nonexistent. Based upon the foregoing, your Plaintiff asserts retaliatory discrimination in violation of Title VII of the 1964 Civil Rights Act.

D. FIFTH AND FOURTEENTH AMENDMENTS

23. That your Plaintiff's Fifth and Fourteenth Amendments were violated when Defendant Evans suspended your Plaintiff from his tenured-track job and deprived your Plaintiff of his liberty and property without due process of law.

* * *